

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S
PETITION FOR
REHEARING
EN BANC**

ORIGINAL

77-1221

**United States Court of Appeals
For the Second Circuit**

UNITED STATES OF AMERICA,

Appellee.

-against-

FRANCIS E. KING,

Appellant.

*On Appeal From The United States District
Court For The Eastern District Of New York*

**PETITION FOR REHEARING OR SUGGESTION
FOR REHEARING IN BANC**

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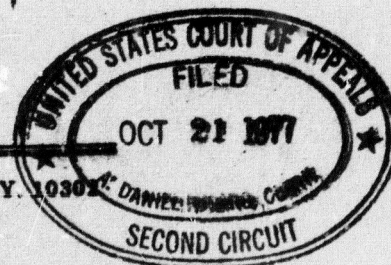


TABLE OF CONTENTS

	<u>Page</u>
The Facts	2
POINT I - Collateral Estoppel	4
POINT II - Evidence	6
POINT III - Venue	10

TABLE OF CONTENTS

<u>CASES CITED</u>	<u>PAGE</u>
U. S. Constitution Art. III	2
Holland v. U. S. 348 U.S. 121	1, 6, 8
Brady v. Maryland 373 U.S. 83 (1963)	1, 10
U. S. v. Agurs 96 S. Ct. 2392 (1976)	1, 10
Ashe v. Swenson 397 U.S. 436 (1970)	1, 4, 6
U.S. Ex Rel DiGiagiemo v. Regan 528 F. 2d 1262 (2d Circ. 1975)	1, 5
Taglianetti v. U. S. (1st Circ. 1968) 398 F. 2d 558	7
U. S. v. Bianco (2d Circ. 1976) 534 F. 2d 501	7
U. S. v. Fisher (2d Circ. 1975) 518 F. 2d 836	7
U. S. v. Fenwick (7th Circ.) 177 F. 2d 488	7
Friendly, "Is Innocence Irrelevant", 38 U. Ch. L. Rev. 142, 151-157	5.
Green v. U. S. 355 U.S. 184, 187 (1957)	5
U.S.A. v. John McGrath (2d Circ. 1977) Slip Opinion Number 1282, 9/2/76 decided 7/19/77	5
Mayer v. Yarbrough, Bis Vexati: New Trials and Succession Prosecutions, 74 Harv. L. Rev. 31-33 (1960)	5
U. S. v. Celentano, 391 F. Supp. 1252 (S.D.N.Y. 1975)	5
Olmstead v. U. S. 277 U.S. 438, 485 (dissent)	6
U. S. v. Calles (CA-5, 1973) 482 F. 2d 1139	6
McFee v. U. S. (CA-9) 206 F. 2d 872	7

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 77-1221

-----x
UNITED STATES OF AMERICA,

Appellee,

- against -

FRANCIS E. KING,

Appellant.
-----x

BRIEF FOR APPELLANT

TO THE HONORABLE COURT:

On October 7, 1977, this Court (Gurfein and Van Graafeiland, Circuit Judges, and Coffrin, U. S. District Judge for the District of Vermont, sitting by designation) unanimously affirmed the judgment of conviction against the Appellant, Francis E. King entered in the United States District Court, Eastern District of New York, Honorable Jack D. Weinstein, Judge.

In this proceeding, Appellant moves this Court to stay the mandate; for rehearing of the October 7, 1977 opinion and order or for the direction of an in banc court to redetermine whether the doctrines enunciated in the Holland vs. U. S., 348 U.S. 121, 75 S. Ct. 127; Brady vs. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963); U. S. vs. Agurs 96 S. Ct. 2392 (1976); Ashe v. Swenson 397 U.S. 436 (1970); U. S. Ex Rel

DiGiagiemo vs. Regan, 528 F. 2d 1262 (2d Cir. 1975) and U. S.

CONST. art. III should be applied to the instant case. This issue is of constitutional magnitude and should be considered by an in banc court.

THE FACTS

Francis E. King, a victim of two indictments, 75 Cr. 973 (December 22, 1975) i.e., conspiracy to violate civil rights for which he was acquitted and 76 Cr. 482 (July 28, 1976) income tax violation for which he was found guilty of violating Code Section 7206 (1) for the year 1970, Code Sections 7201 and 7203 for 1973, and material misstatement by allegedly falsely asserting that he timely filed Federal Income Tax Returns for each of three immediately preceeding years on a request for an extension (26 U.S.C. 7206 (1)). Identical testimony was elicited and used in each trial. King received concurrent sentences of three years on Count One (1970), one year on Count Four (1973, Code Section 7203), five years on Count Five (1973, Code Section 7201) and three years on Count Six (Code Section 7206 (1), Extension Request.

The Government's agent with regard to the opening year, 1970, allegedly based on testimony of Catherine King, Francis King's first wife, gave the defendant credit for no cash on hand at the beginning of 1970 (433-434). This witness on page 436 responding to a question of Assistant U. S. Attorney Puccio stated that the zero balance as of January 1, 1970 was based on his investigation, documents and records admitted here. It

should be noted that Assistant U. S. Attorney Puccio litigated both prosecutions and that the Internal Revenue Service agents (Weinstein and Valenti) were noticed to be present at both trials.

At the original trial 75 Cr. 973 it was revealed that Government witnesses testified to the effect that King was seen with \$12,000 cash in November 1969 (756). Further that in December 1969 King received at least \$600 which was not accounted for by the agent in his testimony with regard to the amount of cash on hand at the beginning of 1970.

Based on expenditures for 1970, the agent testified that during that year King spent approximately \$18,590 as opposed to the \$16,863 which he reported on his 1970 return. It should be noted that although this return is alleged to be a joint return of the defendant and his first wife, no testimony was elicited as to whether she signed the return although it was subsequently revealed that handwriting exemplars were taken from her in the grand jury.

It was conceded that Ann King, the defendant's second wife, in March 1974 (a 669) suffered a nervous breakdown. The defendant in accordance with the rules and regulations of the Internal Revenue Service requested an extension to file a return for the year 1973. He truthfully related the reason for the necessity therefore, and allegedly erroneously reported that he had timely filed his returns for 1971 and 1972. Based on this application an extension was granted to June 15, 1974. No further

extension was applied for and this return was eventually filed on April 3, 1975, with the explanation of his wife's continual illness and the penalty pertaining to timely filed return was not asserted by the Internal Revenue Service.

Taxable income per the investigation for 1973 totalled approximately \$82,000, whereas the return filed on April 3, 1975 reported income of over \$85,000.

It should be noted that testimony by numerous witnesses pointedly revealed that Assistant U. S. Attorney Puccio was "out to get Frank King". 1. Matarasso, Sr. (4900-4908 first trial), 2. Matarasso, Jr. (5052, first trial), 3. Hefferman (3970, 2 and 3, first trial), 4. Roman (2028, first trial), 5. White (1200-10, first trial).

POINT I

Collateral Estoppel

It is now well settled that collateral estoppel, an ingredient of the Fifth Amendment guarantees against being placed in jeopardy twice for the same offense, applies to criminal prosecutions and precludes prosecutions when an issue of ultimate fact has been determined in a defendant's favor by a valid and final judgment in a prior proceeding between the same parties. Ashe vs. Swenson, Supra. Collateral estoppel as a constitutional defense serves to further four separate policies, foremost among which is the policy of protecting the defendant from forced litigation of facts found in his favor. A second function is to preserve the finality of prior favorable adjudication, thus enabling the defendant to rely on them.

The third policy is to prevent the waste of judicial resources by duplicative proceedings. The two latter policies served to protect the defendant by effectively precluding the state from "subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity". The fourth policy is to protect the defendant from "the danger of prosecutorial harassment". Collateral estoppel prevents an over zealous prosecutor from bringing successive prosecution to gain a conviction or to punish the defendant through multiple trials. It was also stated that the prosecutor's use of perjured testimony is an example of where defendants have been deprived of fair trial. See Friendly, "Is Innocence Relevant", 38 U. Ch. L. Rev. 142, 151-157; U.S. Ex Rel DiGiagiemo vs. Regan Supra.; Mayers and Yarbrough, Bis Vexari: New Trials and Excessive Prosecutions 74 Harv. L. Rev., 31-33 (1960; Green v. U. S. 355 U.S. 184, 187 (1957). See also U.S.A. vs. John McGrath (2d Circ. 1977) Slip Opinion Number 1282, September 2, 1976 decided July 19, 1977.

Judge Friendly made it eminently clear that a narrow construction of Ash will not be countenanced by the Second Circuit. It is eminently clear that due to the agent's pervasive testimony and the actions of the Assistant U. S. Attorney to "get King" and conceal exculpatory material that these actions falls squarely within the aforementioned rationale. See also U. S. vs. Celentano, 391 F. Supp. 1252 (S.D.N.Y. 1975). It is manifestly clear that witnesses were threatened,

offered awards (police pensions, etc.) so that they could be "squeezed" in order to effectuate the prosecutors apparent personal vendetta "we want King".

Governmental misuse of power breeds only apathy, contempt and more lawlessness a lesson only recently and painfully learned. See Olmstead v. U. S. 277 U.S. 438, 485 (dissent).

It should be noted that in the opinion regarding Ashe v. Swenson Supra. it was stated that if similar evidence is to be used to prove more than one offense one trial should be had to avoid any possibility of claims of estoppel. This was not followed in the extant situation. The Assistant U. S. Attorney on his own caused separate indictments herein which could not meet the aforementioned policy stated in Ashe v. Swenson.

POINT II

Evidence

The Government relies on the fact that in the years in question Taxpayer's expenditures exceeded the funds available from income. In the Holland case Supra. the Supreme Court stated that an essential condition in a net worth determination of income is the establishment with "reasonable certainty" of an opening net worth to serve as a starting point from which to calculate future increases in the taxpayers net worth. An accurate and definite showing of an opening net worth is the keystone of the calculation process U. S. vs. Calles (C.A. - 5, 1973), 482 F. 2d 1139.

The expenditures method is, in theory, closely related to, if not identical with, the net worth method of proving income. The method

is based on the theory that if the taxpayer's expenditures during a given year exceed his reported income, and the source of such expenditures is unexplained, it may be inferred that such expenditures represent unreported income. One Court noted the similarity of the net worth and expenditures method by following statement:

"... The two computations are merely accounting variations of the same basic method, the expenditure theory being an outgrowth of the net worth method."
(McFee v. U.S., 206 F. 2d 872 (CA-9).

It was also stated therein that in employing either the expenditures method or the net worth method the government must determine with reasonable certainty the taxpayer's beginning net worth in order to have a starting point. The approach to this matter is the same irrespective of which method is used. See also Taglianetti v. U.S., (1st Cir., 1968) 398 F. 2d 558, quoted with approval in U.S. v. Bianco, (2d Cir. 1976) 534 F. 2d 501 and U.S. v. Fisher, (2nd Cir., 1975), 518 F. 2d 836. The Court of Appeals for the 7th circuit in U. S. v. Fenwick, 177 F. 2d 488 stated in part

"...The essential proof of no other assets is the cornerstone of the evidence of the government; that cornerstone being faulty, the whole edifice is so weakened as to be undependable as proof of guilt beyond all reasonable doubt."

Evidence that a taxpayer spent considerably more money on non-deductible items during a given period than he reported as income indicates that he (1) lived in part off capital or (2) borrowed more money than he paid back during the period, or (3) had non-taxable accessions to

wealth or (4) underreported his income. The first 3 possibilities, consistent with a correct return, probably occur in the aggregate more than the 4th.

The labyrinth of one slender thread (testimony of defendant's first wife) woven by the agent to determine a zero net worth cannot be sustained as complying with the requirement of an accurate and definite opening net worth or making clear the extent of any contribution which beginning resources could have made to expenditures.

Moreover in Holland Supra. the Court said of the government *** its failure to investigate leads furnished by the taxpayer might result in serious injustice. Again at page 136, 75, S. Ct. at page 135, the Court said:

"When the Government fails to show an investigation into the validity of such leads, the trial judge may consider them as true and the Government's case insufficient to go to the jury".

It is obvious that the Supreme Court could not have meant that if the Special Agent who follows up the lead simply makes up his mind that the lead produces nothing of advantage to the prosecution, what his investigation discloses becomes a government secret, inaccessible to the defendant, although what the Special-Agent learned by the use of the Government's unlimited machinery of investigation might have been thought significant by a judge or a jury if they had been allowed to learn of it. The Court could not have meant that the Special Agent should be the tribunal empowered to decide criminal tax cases.

The philosophy of Holland, is that the trial of a tax fraud case by the net worth method places a defendant at a disadvantage dangerous to his liberty, and that some departure from the gamesmanship tactics of ordinary trials, even other criminal trials, is necessary to compensate for the disadvantage and make the contest more nearly equal, not done in the extant situation.

With regard to counts 4 and 5, i.e., the year 1973 Ann King, the defendant's second wife became mentally ill at the time the 1973 income tax was due. All during 1974 she was in and out of hospitals for psychiatric care. Thus it was impossible for her to sign the 1973 income tax return and for the defendant to properly file a joint return due to his wife's incapacity to sign. It should be noted that in September, 1974 the defendant gave all information necessary to his accountant for preparation of his 1973 return, prior to the Internal Revenue Service investigation, commenced in November 1974.

The Internal Revenue Service has stated that any sound reason advanced by a taxpayer as the cause for delay in filing the return will be carefully analyzed to determine whether the penalty for delinquency should be asserted. In its manual as examples as sound cause for late filing which, if established will be accepted as reasonable cause, are (a) death or serious illness of a taxpayer or a death or serious illness in his immediate family. There can be no doubt as to the serious illness of Mr. King's wife during this period of time. This fact was accepted by the Internal Revenue Service with regard to not asserting the failure to file penalty

for the 1973 return.

As to the alleged falsity for an extension filed by Mr. King for the 1973 return, it should be noted that illegal wiretaps revealed that Mr. King strongly believed that these returns were mailed by him and was either lost or misplaced by the Internal Revenue Service. Moreover Government records would reveal what they had received. Therefore, no action with regard thereto could have occurred to the Government's prejudice.

POINT III

Venue

When concealment of a material fact with regard to exculpatory material pertinent to a violation allegedly occurring in the Eastern District is concealed by an Assistant United States Attorney no waiver can be deemed to have occurred with regard to this action. Statements and proof with regard to whether the wife signed the 1970 return are proof which the Government must disclose under the rationale of Brady vs. Maryland 373 U.S. 83, 83 S. Ct. 1194, and U.S. vs. Agurs Supra.

Inasmuch as there indeed exists a question of constitutional magnitude, i.e., due process and fair trial, the issue is not frivolous for rehearing, in banc consideration and for review by the United States Supreme Court.

Respectfully submitted,

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New York, N. Y. 10007

APPLEMAN

STATE OF NEW YORK)
 : SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N. Y. 10302. That on the 21 day of Oct. 1977 deponent served the within Petition upon

U.S. Atty. East. Dist. of NY

attorney(s) for
Appellee

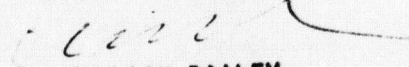
In this action, at

225 Cadman Plaza East., Brooklyn, NY

the address(es) designated by said attorney(s) for that purpose by depositing
3 copies of same enclosed in a postpaid properly addressed wrapper, in an
official depository under the exclusive care and custody of the United States
post office department within the State of New York.


ROBERT BAILEY

Sworn to before me, this 21 day
of Oct. , 1977


WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978

